No. 82-645

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

REPUBLIC NATIONAL LIFE INSURANCE COMPANY

and

AMERICAN LIFE PENSION HEALTH ASSOCIATES, INC.,
Petitioners,

v.

CALVIN C. SPARKS AND SUZANNE SPARKS,
Respondents.

REPLY BRIEF

ROBERT W. HOLLAND
DAVID R. POSTAL
HOLLAND & POSTAL
11th Floor
First Interstate Tower
3550 North Central Ave.
Phoenix, Arizona 85012
(602) 264-2712

DANIEL JOSEPH, P.C.
(Counsel of Record)
RORY F. QUIRK
AKIN, GUMP, STRAUSS, HAUER
& FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF

A short reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari (hereinafter "Opposition") is warranted.

1. Respondents contend that the Petitioners failed to challenge the trial court's *sua sponte* grant of a directed verdict and erroneous jury instructions at the trial level or in appellate briefs before the Arizona Supreme Court, and that those issues may not now be reviewed in this Court. (Opposition at 7-8).[1]

Respondents are in error. The record shows that Petitioners challenged the trial court's *sua sponte* grant of directed verdict and erroneous jury instruction on bad faith

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[1] Respondents concede that they may raise no such objection to Petitioners' challenge to the trial court's *in camera* review of documentary evidence which Petitioners and their counsel were forbidden to see. (*Id.* at 7).

at *both* the trial and appellate levels. (*See* Petition at 4 & n.2, 5). Of course, it was not possible to challenge the opinion of the Arizona Supreme Court in denying rehearing, and it was only in that brief opinion that the Arizona Supreme Court both disapproved the jury instructions and refused to disturb the judgment based thereon. The record further shows that Petitioners challenged the Arizona Supreme Court's unforeseeable dismissal of defendant Planned Security Trust (PST) and simultaneous affirmance of the lump sum damage award on motion for rehearing, *i.e.*, at the earliest possible juncture in the proceedings. (*See* Petition at 8 & n.4).[2] Moreover, the record shows that the deprivation of Constitutional due process is manifest in the actions of the courts below and inherent in Petitioners' challenges to those actions.

Respondents do not dispute that such challenges were raised, but rather seek to reformulate and recharacterize them in a failed effort to defeat this Court's jurisdiction. (Opposition at 7-8). The issues are properly before this Court for review.

2. Respondents seek to justify the Arizona Supreme Court's affirmance of the trial court's *sua sponte* grant of a directed verdict to the plaintiffs at the close of the plaintiffs' case on the ground that the Arizona Supreme Court was merely resolving a question of contract interpretation under Arizona law. (Opposition at 11).

The difficulty with this claim is that the Arizona Supreme Court found it necessary to rely upon the plaintiff's testimony as to her understanding of the policy (Petition at 10; Petition App. 12a)—testimony that the *sua sponte* directed verdict had deprived defendants of the opportunity to rebut. Respondents indirectly, but ef-

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[2] Respondents' contention (Opposition at 8, 13) that Petitioners did not timely raise this issue because such an anomalous result was clearly foreseeable prior to the Arizona Supreme Court's decision is unfathomable.

fectively, concede this reliance on testimony by trying to characterize it as "exemplify[ing]" an "only illustrative" point. (Opposition at 10). These characterizations are ungrounded in the Arizona Supreme Court's opinion; indeed, it is clear that had the Petitioners had the opportunity to put on their evidence concerning the plaintiffs' understanding, and had that evidence been convincing (as Petitioners believe it would have been), then the Arizona Supreme Court could not have affirmed on the ground it chose.[3] Thus, the Arizona Supreme Court's affirmance of the directed verdict for plaintiffs approved the denial of opportunity to the defendants to introduce evidence on the very factual point upon which the Arizona Supreme Court's opinion turned.

Therefore, the issue is whether the Arizona Supreme Court can affirm the trial court's directed verdict against the defendants on the issue of contract liability by relying upon evidence of the plaintiffs that the defendants had been denied any opportunity to rebut. The issue, then, is unmistakably one of Constitutional due process, not Arizona contract law.

3. Respondents attempt to minimize the denial of Constitutional due process arising out of the action of the Arizona Supreme Court with regard to the jury instruction on bad faith by characterizing that Court's action as merely an "approval of the bad faith instruction under Arizona law . . . ." (Opposition at 11). Respondents are in error.

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[3] In the Arizona Supreme Court, the defendants argued that a medical expense insurance policy like the one at issue is held by courts to provide a right of reimbursement only for expenses incurred during the term of the policy. The Arizona Court agreed that this "might be persuasive" if this had been an action between two insurers, but that it had no force in an action between an insurer and an ordinary person who in fact did not so understand it, citing the plaintiff Suzanne Sparks' testimony. (Petition App. 11a-12a).

The Arizona Supreme Court did "approve" the jury instruction in its initial opinion. Then, in acting on rehearing, it changed its mind and *specifically disapproved* the use of that instruction. (Petition App. 33a). At the same time, however, the Arizona Supreme Court affirmed the judgment against Petitioners based upon the very instruction it was holding to be erroneous.[4]

Petitioners' point is that it was a complete abdication of the judicial function for the Arizona Supreme Court to disapprove jury instructions but simultaneously to refuse to disturb the judgment based on those instructions. Whether any part of its holding is consistent or inconsistent with other state law, a court should dispose of a case consistently with the rule of law it announces therein. For whatever reasons, the Arizona Supreme Court did not wish to disturb the jury verdict in this case, but, we submit, it is not consistent with due process for it to disapprove the jury instructions and simultaneously to affirm the jury's verdict.

4. Similarly, the Arizona Supreme Court flatly held that the jury instruction "regarding joint and several liability in tort as to [the defendant] PST *was improper* . . . ." (Petition App. 18a) (emphasis added). Nonetheless, that Court also held that Petitioners had to

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[4] Respondents' efforts to harmonize the inexplicable and irreconcilable actions of the Arizona Supreme Court are a failure. Respondents argue that the Court's Supplemental Opinion merely indicates that the instruction "should not be used as a model" in future cases. (Opposition at 12). In fact, the Court stated unequivocally that: "We . . . *do not approve* the use of those instructions in future cases." (Petition App. 33a) (emphasis added). Respondents also assert that the Arizona Supreme Court merely found the instructions to have been "proper, even if not so perfect that future cases should use them verbatim." (Opposition at 12). As is clear from the previously cited passage from the Arizona Supreme Court's Supplemental Opinion, the instructions are not to be used ever again under any circumstances because they are not and never have been the law of Arizona.

pay the damages assessed on the basis of those erroneous instructions. It could hardly be clearer that Petitioners have been required by the Arizona Supreme Court to pay damages that that Court held at the same time to have been improperly assessed. That does not comport with due process.

Respondents misread the significance of this Court's decision in *Washington Gas Light Co. v. Lansden*, 172 U.S. 534 (1899). That case is important for two reasons. First, it holds that in circumstances like the present (which are *a fortiori*, *see* Petition at 14-15 n.10), the Court must assume that, properly instructed (*i.e.*, with PST excluded as a defendant), the jury would have returned a smaller verdict. Second, and to the contrary of Respondents' assertions, the holding in *Washington Gas Light*

> is based upon the *substantial injustice* which we think might be the result if we were to permit judgment to be entered upon the verdict as against him alone.

172 U.S. at 550 (emphasis added). Thus, it is manifest that this Court's holding was premised upon considerations of fundamental due process, and is applicable to the very similar actions of the Arizona Supreme Court in this instance.

Respondents' assertion (Opposition at 15) that the jury was not "improperly influenced" in its computation of the damage award by the erroneous inclusion of PST is both conjectural and baseless, and cannot in any event justify the Arizona Supreme Court's affirmance of lump sum punitive damages against Petitioners. Such a conclusion could only be borne out by a retrial before a properly instructed jury. In denying Petitioners such a trial and forcing them to pay damages it held should never have been assessed, the Arizona Supreme Court

contravened this Court's clear lesson in *Washington Gas Light*, and denied Petitioners due process of law.

5. In defending the Arizona Supreme Court's affirmance of the assessment of attorney's fees against Petitioners on the basis of the trial court's *in camera* review of documentary evidence that Petitioners were forbidden to see, Respondents argue that this remarkable procedure did not impinge upon Petitioners' due process rights because the trial judge was fully apprised of the evidence submitted. (Opposition at 16). This is most emphatically not the law. To satisfy due process, "[a]ll *parties* must be fully apprised of the evidence submitted or to be considered . . . ." *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93 (1913) (emphasis added).[5]

The Respondents' claim that the trial court did not use the fee agreement as evidence as to the size of the award "but only to ensure that the award did not exceed the limit set by the statute" (Opposition at 17) is both self-contradictory and irrelevant. Even if the latter purpose is distinct from the former, the trial court still accepted the fee agreement as evidence for that purpose, and due process requires that such evidence must be revealed to all parties.[6]

In affirming a procedure which denied Petitioners—parties to the proceedings below—access to evidence, the

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[5] Respondents go to great pains to minimize the evidentiary import of the fee agreement and argue that disclosure "would have served no purpose . . . ." (Opposition at 17). This begs the question. Disclosure would have satisfied due process.

[6] The Respondents misleadingly suggest (Opposition at 17) that some claim of privilege was involved. No such claim was or could have been made in the Arizona Supreme Court, and privilege was not mentioned by that Court.

Arizona Supreme Court denied them the due process of law.[7]

Respectfully submitted,

ROBERT W. HOLLAND
DAVID R. POSTAL
HOLLAND & POSTAL
11th Floor
First Interstate Tower
3550 North Central Ave.
Phoenix, Arizona 85012
(602) 264-2712

BY: _____
DANIEL JOSEPH, P.C.
(Counsel of Record)
RORY F. QUIRK
AKIN, GUMP, STRAUSS, HAUER
& FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000
Counsel for Petitioners

DATE: November 24, 1982

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[7] The fact that the document is under seal in the court file (Opposition at 17) does not excuse the Constitutional deprivation wrought by the Arizona Supreme Court. It merely underscores it. Moreover, if the document is in fact so inconsequential, there was no reason for Respondents to deny Petitioners an opportunity to inspect it.